In the Supreme Court of the United States

October Term, 1978

No. 78-235

PITTSBURGH & NEW ENGLAND TRUCKING CO.,
211 Washington Avenue, Dravosburg, PA 15034
Petitioner

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Respondents

YOURGA TRUCKING, INC., COLONIAL FAST FREIGHT LINES, INC. AND COLONIAL REFRIGERATED TRANSPORTATION, INC.,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pittsburgh & New England Trucking Co., the petitioner herein, respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals For The Third Circuit entered in this matter on May 3, 1978 at Docket No. 76-2617.

OPINIONS BELOW

By Order dated May 3, 1978, the Court of Appeals, the Order the propriety of which is herein sought to be reviewed

and which is printed in Appendix A hereto, infra, page 14, granted the motion of the Interstate Commerce Commission, respondent below, to dismiss petitioner's Petition For Review for failure to exhaust administrative remedies.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC §1254 (1).

QUESTION PRESENTED

Whether an interstate common motor carrier which has made a good faith effort to comply with confusing and complex regulations of the Interstate Commerce Commission is required to petition the Interstate Commerce Commission for reconsideration of its decision, by an Order, to reject summarily an application for gateway eliminations containing one hundred and fifty-one distinct parts, before the motor carrier may seek review of such decision in a court of the United States.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves Section 704 of the Administrative Procedure Act (5 U.S.C. 704), which provides as follows:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

STATEMENT OF THE CASE

This petition for a writ of certiorari to the United States Court of Appeals For The Third Circuit is brought in order to require the court below to review on the merits, the petition brought in that court for review of an order of the Interstate Commerce Commission.

Petitioner is authorized by the Interstate Commerce Commission to transport general commodities, with certain exceptions, and specifically named commodities, over regular and irregular routes, between various points in the United States pursuant to certificates of public convenience and necessity issued by the Commission under the provisions of the Interstate Commerce Act at Docket No. MC-113974 and various sub-numbers thereto.

The Interstate Commerce Commission proposed by regulations which became effective on April 5, 1974 to conserve motor fuels and improve the quality of the environment. These regulations (49 C.F.R. §1065) permitted

common motor carriers of property holding irregular route certificates to eliminate gateways. A gateway in this context means a geographical point to which and from which a motor carrier may provide transportation service for a particular commodity under two or more separate grants of operating authority.

The requirement for motor carriers to physically transport a commodity through a gateway service point if it desired to provide maximum service to regular customers almost invariably resulted in increasing the highway miles between two service points thereby causing operating inefficiencies for motor carrier, unnecessarily increasing the consumption of valuable motor fuels and endangering the public safety with unnecessary pollutants and highway congestion.

The gateway elimination regulations provided two procedures for eliminating gateways: (a) where the direct highway distance between the points to be served was not less than eighty percent of the highway distance between such points over the carrier's authorized routing through the gateway, the carrier submitted to the Commission a letter notice which was then published in the *Federal Register;* and if no protests were filed within ten days of the publication of the notice, the elimination of the gateway would be granted; (b) where the direct highway distance between the points to be served was less than eighty percent of the highway distance between such points over the carrier's authorized routing through the gateway, the carrier submitted a Commission prescribed application OP-OR-9 along with other evidence including evidence of services performed. (Hereinafter the procedure designated (a) above will be referred to as the "20% rule procedure" or the "letter-notice procedure" and the procedure designated (b) above will be referred to as the "OP-OR-9 application procedure".) The failure of a carrier to utilize either or both of the above

described procedures foreclosed a carrier (except for a very limited situation described at 49 C.F.R. §1065.1 (b)) from thereafter using gateways which were previously available to or in fact used by a carrier.

The petitioner had fourteen weeks in which to utilize one or both of the above described procedures in order to eliminate its gateways. The enormity and difficulty of the task faced by the petitioner is readily understood when it is realized that petitioner was required to determine all possible gateways involved with its thirty-one grants of irregular route authority which involved 28 different, but overlapping, commodity descriptions and authorized service to, from, or between points in 37 states and the District of Columbia. All compatible commodity descriptions had first to be determined, then a time-consuming analysis made on every possible combination to determine whether the tacking operations were within the 20% Rule. In many cases three and sometimes four grants of authority could be tacked in sequence, resulting in the elimination of two or three separate gateways. Through this trial and error process involving innumerable mathematical calculations the boundaries of the territory within the 20% Rule were determined.

Petitioner filed as many letter-notice applications as possible on June 4, 1974, which was the last day the Commission would accept applications under the letter-notice procedure.

Also on June 4, 1974, petitioner filed its OP-OR-9 application which was assigned Docket No. MC-113974 (Sub No. 50G) by the Commission. To the OP-OR-9 application petitioner attached a Request to Amend And/Or Supplement the Application. That request variously stated, "... the procedures established in the Commission's decision are complex and require a great deal of analysis and

preparatory work before the letter-notices may be properly perpared and filed .... Applicant has made a good faith attempt to comply with the letter of the Commission's report. The preparation of complete and accurate letter-notices has occupied applicant's traffic personnel almost exclusively since the issuance of the report. As a result, applicant has not been able to devote sufficient time to adequately analyze its gateway operations with respect to those operations which exceed the 20% formula. Most importantly, it is impossible to formulate the 207 application and prepare all supporting abstract shipments until all letter-notices are completed since there is a direct correlation between the letter-notices and the applications." Petitioner thereafter requested that it be allowed to supplement its application with traffic exhibits and other necessary detailed information subsequent to June 4, 1974.

Subsequent to June 4, 1974 petitioner analyzed its complex operating authority in order to more specifically set forth the scope of authority being requested and compiled voluminous traffic exhibits for the two year period from November 23, 1971 to November 23, 1973 in accordance with the Commission's regulations. The supplemental information was submitted to the Commission which, without publishing the application in the *Federal Register* as required by the regulations, rejected the supporting traffic information and dismissed the application by order served June 3, 1975.

On July 2, 1975 petitioner then filed a petition for reconsideration of the Commission order which was denied by the Commission's order served August 28, 1975. On or about October 2, 1975 petitioner then filed with the Commission a Petition for Stay of the order served August 28, 1975. By order served October 17, 1975 the Commission denied the Petition for Stay.

On or about October 17, 1975 petitioner filed with the Court of Appeals a Motion for Stay, and Petition to Review, Set Aside and Enjoin the Order of the Commission. The proceeding was assigned No. 75-2170. Subsequently, by order served January 15, 1976, the Commission, subject to the approval of the Court of Appeals, reopened the case for acceptance and consideration of any late-filed evidence which was not previously considered by the Commission, and for further processing under the gateway elimination procedure. The proceeding was reopened in accordance with the Commission's General Policy Statement published in the *Federal Register* on January 16, 1976 as a result of the decision in *Squaw Transit Company v. United States*, 402 F. Supp. 1278 (N.D. Okla. 1975).

The Court of Appeals granted a motion to remand the proceeding to the Commission on February 23, 1976.

The 151 part application was subsequently published in the *Federal Register* on April 28, 1976. Several protests were filed to the application including protests by the intervenors.

By order served October 13, 1976 the Commission by Review Board No. 1 again completely denied the application without giving consideration to each individual part. The Commission's Order is printed in Appendix B, hereto, infra, pages 15-18.

On or about December 14, 1976 petitioner filed with the Court of Appeals a Motion for Stay of the Commission's Order, and Petition to Review, Set Aside and Enjoin the Commission's Order. On or about December 17, 1976 the Commission filed a motion with the Court of Appeals to dismiss the Petition for Review.

By order dated December 22, 1976 the Court of Appeals granted petitioner's motion to stay the effect of the order of the Commission served October 13, 1976. Also by order dated December 22, 1976 the Court of Appeals referred the

Commission's motion to dismiss the petition for review to a merits panel for disposition.

On April 27, 1978, the Court of Appeals for the Third Circuit heard oral argument by the petitioner, respondent and intervenors and, then, by Order, dated May 3, 1978, it granted the motion by the Respondent, Interstate Commerce Commission, to dismiss petitioner's Petition For Review for failure to exhaust administrative remedies.

REASONS FOR GRANTING THE WRIT

Special and important reasons exist for this Court to grant the petition for a writ of certiorari. The Court of Appeals for the Third Circuit improperly granted the Interstate Commerce Commission's motion for dismissal of the petitioner's Petition For Review for failure by the petitioner to exhaust its administrative remedies. In so doing, the Court of Appeals improperly applied proper criteria for requiring the exhaustion of administrative remedies and by so doing, permitted the Interstate Commerce Commission to deny to the petitioner its Fifth Amendment right to due process and permitted the Commission to exercise its statutory authority in an arbitrary, capricious and unreasonable manner, all to the detriment of the petitioner.

The Commission to some extent recognized the difficulty the carriers were having in complying with its strict filing time limits and expressly permitted, by an order dated April 4, 1974, carriers to include in their OP-OR-9 applications, applications for the elimination of gateways which otherwise qualified for elimination under the near automatic letter notice procedure. All or part of one hundred and eleven of the one hundred and fifty-one parts of the petitioner's OP-OR-9 application qualified for treatment under the letter notice procedure, but were included in the OP-OR-9 application because of time and manpower problems. The Commission should have required nothing

more of the petitioner with respect to those parts of its OP-OR-9 application which qualified for treatment under the letter notice procedure. Notwithstanding this, the Commission summarily denied and dismissed petitioner's OP-OR-9 application and by so doing, the Commission arbitrarily, capriciously and unreasonably abused its statutory authority.

The Commission's final order (Appendix B, hereof, pages 15-18) clearly reflects that consideration was not given to each part of petitioner's OP-OR-9 application. Petitioner could have filed one hundred and fifty-one OP-OR-9 applications but chose for both its and the Commission's convenience to consolidate all of the gateways it sought to eliminate in a single application. That the Commission did not find that a single part of petitioner's application had merit and that only a select few of the parts were referenced in the Commission's order should have been prima facie evidence to the Court of Appeals that the Commission had abused its statutory authority and denied to the petitioner its Fifth Amendment right to procedural and substantive due process of law.

The Commission has attempted to wrongfully deprive the petitioner of operating authority which it held before June 4, 1974 and the Court of Appeals has improperly granted the Commission's motion for dismissal of the petitioner's Petition for Review for the petitioner's failure to exhaust its administrative remedies.

The purposes for the exhaustion of administrative remedies doctrine is to allow the administrative agency to perform functions within its special competence, to make a factual record, to apply its expertise and to correct its own errors. Not one of these purposes is satisfied in this instance. To summarily dismiss and deny the petitioner's application in the manner in which the Commission did so obviously

requires no special competence. The Commission's final order demonstrates that no attempt was made to apply its expertise to the entire application as its legislatively delegated duty requires.

To require the petitioner to re-petition the Commission for reconsideration is to push the exhaustion doctrine beyond reasonable limits. On June 3, 1975, the Commission had before it petitioner's entire application and supporting evidence and denied and dismissed the application by order served June 3, 1975. On July 2, 1975, petitioner filed a petition for reconsideration which was denied by Commission's order served August 28, 1975. As a result of other litigation hereinabove described the Commission did allegedly reconsider the petitioner's application and, again, dismissed and denied the application by Commission's Order served October 13, 1976. The futility and uselessness of requiring the petitioner to again petition the Commission for reconsideration is evident, for if the petitioner had petitioned for reconsideration the same Commission personnel which before had denied reconsideration would have had no new information to consider. The Commission had one opportunity to find and correct any agency error. It is unreasonable to require the petitioner to petition the Commission for re-reconsideration which is what the Court of Appeal's Order says the petitioner failed to do.

Section 704 of the Administrative Procedure Act (5 U.S.C. §704) provides the lawful criteria for judicial review of agency actions. There is no expression in the Interstate Commerce Act (See, 49 U.S.C. §17 (9)) which requires anything more of the petitioner than a petition for reconsideration. Such a petition on the first summary denial of the petitioner's OP-OR-9 application was made and denied. There was no superior agency authority to which the petitioner could address an appeal. Therefore, the Commission's second summary denial of the petitioner's OP-OR-9 application, under Section 704 of the Administrative Procedure Act, was final agency action sufficient to be subject to judicial review.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

Respectively Submitted,

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United States Court of Appeals
For the Third Circuit

No. 76-2617

PITTSBURGH & NEW ENGLAND TRUCKING CO.,
211 Washington Avenue,
Dravosburg, Pa. 15034
Petitioner

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Respondents

YOURGA TRUCKING, INC., a corporation of Wheatland, Pennsylvania,
COLONIAL FAST FREIGHT LINES, INC. and COLONIAL REFRIGERATED TRANSPORTATION, INC.,
Intervenors.

Argued April 27, 1978

PRESENT: SEITZ, *Chief Judge*, ALDISERT, *Circuit Judge*, and STERN, *District Judge*.

ORDER

The motion by Respondent, Interstate Commerce Commission, to dismiss Petitioner's Petition For Review is granted for failure to exhaust administrative remedies. Costs taxed against petitioner.

By the Court,

/s/ SEITZ
Chief Judge

DATED: May 3, 1978

ATTEST:

/s/ THOMAS F. QUINN
Thomas F. Quinn, Clerk

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 1, held at its office in Washington, D.C., on the 4th day of October, 1976.

No. MC-113974 (Sub-No. 50G)

PITTSBURGH & NEW ENGLAND TRUCKING CO.
EXTENTION—GATEWAY ELIMINATION
(Dravosburg, Pa.)

IT APPEARING, That by application filed June 4, 1974, the above-named applicant, a corporation, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of the commodities and from and to the points indicated in the Federal Register publication of April 28, 1976;

IT FURTHER APPEARING, That the application has been considered under the Commission's special gateway elimination procedure (49 CFR 1065); that additional material in support of this application was filed on June 18, 1974, April 25, May 4, and May 12, 1975; that by order dated May 27, 1975, this Commission rejected that portion of applicant's evidence which was tendered after the June 4, 1974, deadline specified in the gateway elimination rules (49 CFR 1065.1(d)(2)(iv)), and dismissed the application for the reasons that applicant had failed timely to produce the required evidence in support of the application and that no supplementary evidence was being accepted in these proceedings; that additional supplemental material in support of this application was tendered on June 3, and 4, 1975; that by petition filed July 3, 1975, applicant sought reconsideration of this Commission's order of May 27, 1975, which petition was denied by order of Division 1, Acting as an Appellate Division, on August 20, 1975; that by petition filed October 6, 1975, applicant sought a stay of the order of

Division 1, Acting as an Appellate Division, of August 20, 1975; that by order dated October 15, 1975, applicant's petition for a stay of the Commission's order of August 20, 1975, was denied; that on or about October 17, 1975, a court action was instituted involving the instant application before the United States Court of Appeals for the Third Circuit; that by order dated January 15, 1976, this Commission reopened the record in this proceeding for the acceptance of late-filed evidence and for reconsideration of this application in the light of such evidence; that notice of this application was published in the Federal Register on April 28, 1976; and that protestants Vance Trucking Company, Inc., and Raeford Trucking Company (jointly) and Dallas & Mavis Forwarding Co., Inc., Mercury Motor Express, Inc., Colonial Refrigerated Transportion, Inc., Colonial Fast Freight Lines, Inc., Herriott Trucking Company, Inc., Senn Trucking Company, Freeport Transport, Inc., Hall's Motor Transit Company, Jetco, Inc., and Yourga Trucking, Inc., motor common carriers, have filed verified statements in opposition to the application;

IT FURTHER APPEARING, That upon consideration of the evidence of record we believe that this application should be denied in its entirety; that a significant number of the 151 parts of this application are unsupported by any description of traffic which might have been transported through the pertinent gateways;[1] that in many instances applicant lists the same shipment (identified by freight bill number) to

[1]The following parts of this application are unsupported by any traffic:

(1)-(4), (8), (11), (12), (16)-(19), (25), (31), (36), (37), (39), (40), (44), (50)-(53), (55), (56), (60), (63), (64), (66), (70), (73), (74), (77)-(79), (81), (82), (85), (90), (92), (97), (98), (100)-(104), (106)-(108), (111), and (127)-(142).

support several different parts of this application;[2] that in certain instances applicant fails to include in its requests for authority the restrictions contained in the underlying certificates upon which parts of its application are based;[3] that applicant includes in its traffic abstracts a substantial number of shipments which are not relevant to an application under the gateway elimination rules inasmuch as those shipments were transported prior to the 2-year period specified in the gateway elimination rules (49 CFR

[2]A random sampling of applicant's traffic abstract indicates that the following shipments (described by freight bill number) were described in support of the parts of this application listed below:

Shipment (freight bill number)	Parts of this application in support of which this shipment is described
#263451	(32), (41), (46), (47), (48)
#263452	(32), (41), (46), (47), (48), (49)
#263610	(32), (41), (45), (46), (47), (48)
#263611	(32), (41), (45), (46), (47), (48)
#264244	(5), (6), (10), (28), (41), (45), (46), (54)
#264424	(5), (6), (10), (26), (41), (45), (46), (54)
#264707	(20), (21), (28), (32), (41), (46) (47), (48)
#264893	(5), (6), (10), (41), (46)
#265062	(21), (23), (28), (41), (45), (46), (48)
#265290	(21), (23), (32), (41), (45), (46) (47), (48)
#266173	(26), (28)

This listing is not intended to be exhaustive, nor does it include those shipments listed by protestant Mercury, in its verified statement, which applicant described in support of more than one part of this application.

[3]In particular, parts (58) through (61) of this application do not include a restriction against "service between any two incorporated cities and towns, both of which are served by rail." Because applicant seeks direct authority on the basis of operations conducted by tacking paragraph 9 of its lead certificate with various other authorities it holds, applicant should have included that restriction in any authority it requested in parts (58) through (61) of this application.

1065.1(d)(2)(iii)); that the operations underlying some parts of this application involve such circuity that we doubt that such operations have ever been conducted;[4] that although applicant has been given ample time within which to prepare and amend this application, it has failed to present credible, useful, or relevant evidence upon which to base an appropriate grant of authority or to describe its past

[4]For example, in part (73) of this application, applicant seeks direct authority to operate from Ohio to points in Arkansas, Indiana, and Kentucky (among other States). In order to conduct such operations, applicant would have been required to operate through gateways at Ashtabula, Ohio, and Philadelphia, Pa. A comparison of direct and gateway mileages involved in operating from Ashtabula to West Memphis, Ark., Richmond, Ind., and Ashland, Ky., highlight the excessive circuity involved in conducting some of the operations described by applicant.

Ashtabula-West Memphis:			
Direct Mileage:	772 miles	[Ashtabula-Philadelphia	383 miles
Gateway mileage:	1388 miles	Philadelphia-W. Memphis	1005 miles
Percent circuity:	180%	Total gateway miles	1388 miles]
Ashtabula-Richmond:			
Direct mileage:	291 miles	[Ashtabula-Philadelphia	383 miles
Gateway mileage:	950 miles	Philadelphia-Richmond	519 miles
Percent circuity:	326%	Total gateway miles	950 miles
Ashtabula-Ashland:			
Direct mileage:	309 miles	[Ashtabula-Philadelphia	383 miles
Gateway mileage:	902 miles	Philadelphia-Ashland	519 miles
Percent circuity:	291%	Total gateway mileage	902 miles]

Other examples abound. In part (124) of this application, applicant seeks direct authority to operate between points in Massachusetts, on the one hand, and, on the other, points in New Hampshire and Vermont. Such operations would have had to be conducted through a point in Connecticut within 35 miles of Columbus Circle, N.Y. In part (144) applicant seeks authority to transport described commodities between points in New Jersey, on the one hand, and, on the other, points in Pennsylvania. These operations would have had to be conducted through gateways at Lawrence or North Andover, Mass. In part (149) of the application, applicant seeks direct authority to operate from points in New Jersey within 35 miles of Columbus Circle, N. Y., to points in Maine, New Hampshire and Vermont. These operations would have had to be conducted through a gateway in western Pennsylvania.

operations in such a way as to make possible a determination of the extent to which it is a substantial or effective competitor for the traffic it attempts to describe; that it is not our function to prepare an applicant's presentation or to eliminate the irrelevant material from that presentation; and that we will, therefore, deny this application insofar as applicant seeks direct authority on the basis of past operations through the described gateways;

AND IT FURTHER APPEARING, That Weirton Steel Division, National Steel Corporation, supports this application insofar as applicant seeks authority to transport various metal products from Weirton, W. Va., to points in Virginia and to the District of Columbia; that Weirton states that between 1972 and 1974 it requried transportation of nearly 1,500 shipments aggregating 32,000 tons to the District of Columbia and to "points scattered throughout Virginia"; that shipper generally complains that "half" of the available carriers are certified to serve only a portion of "the many destinations located in Virginia", and asserts that the fact that not all vehicles operated by these carriers are properly licensed increases the difficulty of making prompt deliveries to customers; that Weirton's evidence fails to establish a public need for the additional motor authority described in its verified statement; that this shipper does not describe the extent (if any) to which it has used applicant's services for the transportation of shipments from Weirton to points in Virginia and the District of Columbia, nor does it list the carriers whose services it generally uses (including that half of those carriers it now uses who are, by implication, authorized to serve all Virginia points and whose vehicles are properly licensed for that purpose); and that because such ambiguous evidence as Weirton presents cannot possibly form the basis for a grant of authority, this application will be denied.

Wherefore, and good cause appearing therefor:

WE FIND, That applicant has failed to establish that the present or future public convenience and necessity require the proposed operation; that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; and that the application should be denied.

IT IS ORDERED, That said application be, and it is hereby, denied.

By the Commission, Review Board Number 1, Members Carleton, Joyce, and Jones.

ROBERT L. OSWALD,
Secretary

(SEAL)

No. 78-235

In the Supreme Court of the United States

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PITTSBURGH & NEW ENGLAND TRUCKING CO., ETC.,
PETITIONER

v.

THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-235

PITTSBURGH & NEW ENGLAND TRUCKING CO., ETC.,
PETITIONER

v.

THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

At issue is whether the court of appeals properly dismissed a petition for review because petitioner failed to exhaust clearly mandated administrative remedies.

Petitioner, a common carrier by motor vehicle, filed a 151-part gateway elimination application pursuant to the Interstate Commerce Commission's "gateway elimination" rules.[1] The application was filed without the evidence

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[1]Under what was termed the "gateway elimination" policy, the Commission agreed to consider applications from trucking companies for direct service authorizations between points that the companies had previously served only indirectly. *Gateway Elimination Decision*, 119 M.C.C. 530. 49 C.F.R. 1065.1. This Court upheld the gateway elimination rules in *Thompson Van Lines, Inc.* v. *United States*, 423 U.S. 1041, affirming 399 F. Supp. 1131 (D. D.C.).

required by the gateway rules. Petitioner subsequently attempted to file late evidence, but it was rejected by the agency. Because the record did not contain the supporting evidence required by the gateway rules, the application was dismissed. Petitioner then filed a petition for reconsideration, which a three-member division of the Commission denied in August 1975.

Petitioner sought judicial review in the United States Court of Appeals for the Third Circuit. During the pendency of the petition for review, the Commission issued a policy statement which provided for the acceptance of previously tendered late-filed evidence. As a result, the Commission, subject to the court's approval, reopened petitioner's application for acceptance and consideration of the late-filed evidence. The court of appeals then granted the Commission's unopposed motion to remand the case.

The reopened proceeding was assigned to a Commission employee review board for initial decision. After considering the additional evidence of record, the employee review board denied petitioner's application by an order served in October 1976 (Pet. App. B).

Instead of seeking Commission consideration of the employee board's order, petitioner filed a petition for judicial review. On May 3, 1978, the court of appeals granted the Commission's motion to dismiss for failure to exhaust administrative remedies (Pet. App. A).

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is not warranted.

1. It is well settled that judicial review of administrative agency decisions must be postponed until the available administrative remedies have been exhausted. *Federal*

Communications Commission v. *Schreiber*, 381 U.S. 279, 296; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51. Section 17(9) of the Interstate Commerce Act, 24 Stat. 385, as amended, 49 U.S.C. 17(9), specifically bars judicial review of employee board orders, unless a petition for reconsideration "shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division." To implement this statutory mandate, the Commission's rules of practice (49 C.F.R. 1100.101(a)(2)) explicitly provide that orders of employee review boards are not administratively final:

> Decisions of an employee board, whether original or on review, are *not administratively final*. Such employee board decisions shall be subject to review by an appropriate appellate division of the Commission upon the filing of a timely petition in accordance with these rules of practice. (emphasis added).

Accordingly, the court of appeals lacked jurisdiction to review the decision and correctly dismissed the petition for review. See *McGee* v. *United States*, 402 U.S. 479; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497-501.

2. Petitioner contends that to exhaust administrative remedies would have been useless in this case, because the Commission had previously (in August 1975) denied a petition for reconsideration of its initial decision to reject the late-filed evidence (Pet. Br. 10). But the fact that reconsideration of the prior order was unsuccessfully sought is entirely irrelevant to the reviewability of the October 1976 order at issue here. The instant order of the employee board was based on the merits of the record as augmented by the late-filed evidence and reflected wholly different considerations

than the 1975 order. That ruling did not reach the merits and merely dismissed the application for lack of evidence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
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ROBERT D. JONES,
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SEPTEMBER 1978.

DOJ-1978-08

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-235

PITTSBURGH & NEW ENGLAND TRUCKING CO.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,
and
INTERSTATE COMMERCE COMMISSION,

Respondents,

COLONIAL FAST FREIGHT LINES, INC.,
COLONIAL REFRIGERATED TRANSPORTATION, INC.,
and
YOURGA TRUCKING, INC.,

Intervenors in Support of Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-235

PITTSBURGH & NEW ENGLAND TRUCKING CO.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,
and
INTERSTATE COMMERCE COMMISSION,

Respondents,

COLONIAL FAST FREIGHT LINES, INC.,
COLONIAL REFRIGERATED TRANSPORTATION, INC.,
and
YOURGA TRUCKING, INC.,

Intervenors in Support of Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Colonial Fast Freight Lines, Inc., Colonial Refrigerated Transportation, Inc., and Yourga Trucking, Inc., hereinafter referred to as Intervenors, hereby register their opposition to, and urge the denial of, the petition for a writ

of certiorari to the United States Court of Appeals for the Third Circuit filed by Pittsburgh & New England Trucking Co., hereinafter referred to as Petitioner.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued an order on May 3, 1978, dismissing the Petition for Review of Pittsburgh & New England Trucking Co. in No. 76-2617, *Pittsburgh & New England Trucking Co. v. United States,* on the ground of the failure (of Petitioner) to exhaust administrative remedies.

The Interstate Commerce Commission never rendered an opinion in this case subsequent to the remand of the case by the United States Court of Appeals for the Third Circuit in No. 75-2170, *Pittsburgh & New England Trucking Co. v. United States.* The decision that Petitioner seeks to have reviewed is that of an employee review board of the Commission. That decision, contained in Docket No. MC-113974 (Sub-No. 50G), *Pittsburgh & New England Trucking Co., Extension-Gateway Elimination,* was rendered on October 4, 1976.

JURISDICTION

Intervenors submit that this Court lacks jurisdiction to consider this matter insofar as the United States Court of Appeals for the Third Circuit, whose order Petitioner seeks to have this Court review, determined that it lacked jurisdiction by virtue of Petitioner's failure to exhaust administrative remedies available to it.

QUESTION PRESENTED

Whether this Court has jurisdiction over a question that should have been addressed by the Petitioner to the Interstate Commerce Commission, rather than to a federal court.

STATUTES AND REGULATIONS INVOLVED

This case raises questions as to the proper application of: Section 704 of the Administrative Procedure Act, 5 U.S.C. § 704, providing:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review . . . . Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority;

Section 2342 of the Judiciary Act, 28 U.S.C. § 2342 (1970 & Supp. V), providing:

> The court of appeals has exclusive jurisdication to enjoin, set aside, suspend (in whole or in part) or to determine the validity of –
>
> . . .
>
> (5) all rules, regulations, or final orders of the Interstate Commerce Commission . . . ;

Section 17(10) of the Interstate Commerce Act, 49 U.S.C. § 17(10), providing:

> When an application for rehearing, reargument, or reconsideration of any decision, order or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or by reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or

> requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise;

and, Rule 101(a) (2) of the Interstate Commerce Commission's General Rules of Practice, 49 C.F.R. § 1100.101(a) (2) (1976), providing:

> Decisions of an employee board, whether original or on review, are not administratively final. Such employee board decisions shall be subject to review by an appropriate division of the Commission upon the filing of a timely petition in accordance with these rules of practice.

STATEMENT OF THE CASE

Intervenors will not repeat the statement of the case as set forth by Petitioner, rather limiting their comments to a few matters that require further mention. Otherwise, the statement of Petitioner is adopted although much of it is not considered pertinent to the resolution of this case by this Court.

First, it should be noted that the proceedings before the agency prior to the first petition to the Third Circuit consisted of a summary dismissal of Petitioner's application on an essentially procedural basis: the failure to accompany the application with the evidence required by the pertinent regulation, 49 C.F.R. § 1065. The initial decision in this regard was that of a single Commissioner, in which all late-filed evidence was rejected and the application was dismissed for want of evidence. On petition for reconsideration, a Division of the Commission (composed of three Commissioners), affirmed the dismissal. Thus, it can readily be seen that the Division did not look

at the evidence at all. Therefore, Petitioner's suggestion (later in its petition) that the Commission was already predisposed against it on the merits (thus presumably making a further administrative appeal futile), is unsupported by the facts present here.

Second, it must also be noted that, despite Petitioner's repeated references on page 7 of its petition to orders of "the Commission," the referred-to orders were not those of the Commission, but rather those of its employee Review Board. Petitioner's preemptory action deprived the Commission itself of an opportunity to consider Petitioner's evidence and to correct errors, if any, in the Review Board's decision.

Finally, intervenors must also take exception to Petitioner's use of the term "final order" to describe the Review Board's decision in the case under review. The word "final," in the administrative context, is a word of art. It conjures up the notion of administrative finality, which is jurisdictional under 28 U.S.C. § 2342 (1970 & Supp. V). While the involved order may be the final order in the sense that it is the last order chronologically, for reasons to be described below, it is not a "final" order under the governing statutory provisions.

ARGUMENT IN OPPOSITION TO THE PETITION

I.
THE ORDER IN QUESTION IS NOT A "FINAL" ORDER

In order for a federal court to have jurisdiction to review an order of the Interstate Commerce Commission, 28 U.S.C. § 2342 provides that the order must be a final one. Without such finality, the court's jurisdiction cannot be invoked. Under 5 U.S.C. § 704, agency action is final despite the pendency of a petition seeking reconsidera-

tion of another appeal to a superior agency authority *unless* the agency provides otherwise by rule. Here, the Interstate Commerce Commission has a rule (49 C.F.R. § 1100.101(a)(2)) providing specifically that an employee board decision is *not* administratively final and that the same *shall* be subject to a petition seeking review of the decision by the Commission itself.

Here, Petitioner failed to file a petition for reconsideration. Instead, it sought judicial review. The order which it sought to have reviewed was not final by the specific terms of the Commission's regulations.

II.
PETITIONER FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES

Because it failed to file a petition before the Commission, and therefore sought review of a non-final order, Petitioner's petition for review in the Third Circuit was properly denied. That court correctly determined that it lacked jurisdiction to consider the appeal. For the same reason, the Petition now before this Court must be denied. The doctrine of exhaustion is well-settled and no significant question warranting the attention of this Court has been presented.

Exhaustion as a prerequisite to judicial review is an important doctrine necessary to the preservation of the integrity of the administrative process as well as the notion of judicial deference to agency expertise. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Contrary to Petitioner's suggestion, this case demonstrates precisely why exhaustion is important in the administrative setting. Only by confusing the employee Review Board with the Commission itself can Petitioner reach its conclusion. As this Court said in

McKart v. United States, 395 U.S. 185, 193-95 (1969), the ability of an agency to correct errors made by its employees is an important part of the exhaustion doctrine. *Accord, Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). The Commission did not get this opportunity in this case and thus, even assuming arguendo that Petitioner is correct, it is addressing its complaint to the wrong forum.

Finally, it should be noted that the only exception to the exhaustion doctrine is in those rare cases where irreparable harm would result from a delay in judicial review. Here, Petitioner continued to operate throughout the pendency of the agency proceeding and could have continued to do so while it filed a petition. Since added litigation costs do not constitute irreparable harm, no exception is applicable here. *See Renegotiation Board v. Bannercraft Co.*, 415 U.S. 1, 23-24 (1974).

CONCLUSION AND PRAYER

WHEREFORE, Intervenors pray that this Court will find no warrant for review of this case; that the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied; and for such other and further relief as it deems proper in these premises.

Respectfully submitted,

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DATED AT:
Washington, D.C. 20001
August 31, 1978